COCOA MERCHANTS LTD.

v.

K. R. JAYARAMAN

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 60 OF 1985]
19 MAY 1986

CIVIL PROCEDURE: *Appeal against decision of learned Registrar dismissing plaintiffs' application to enter final judgment against defendant under O. 14 of the Rules of the High Court - Whether defendant had raised any triable defence to enable the Court to grant him unconditional leave to defend.*

This is an appeal by the plaintiffs against the decision of the learned Registrar made on 3 October 1985 dismissing the plaintiffs' application for leave to enter final judgment against the defendant under O. 14 of the Rules of the High Court. The basis of the plaintiffs' claim is on four promissory notes given by the defendant to the plaintiffs on 27 August 1984 and payable to them on 31 October 1984. However, when these four promissory notes were presented at the plaintiffs' bank they were dishonoured.

The defendant raised the following issues to show that there was a triable defence:

(i) that the four promissory notes which he had issued are not promissory notes within the meaning of the Bills of Exchange Act 1949;

(ii) that as the basis and conditions on which the said notes were given had not been complied with, there was therefore a breach of the terms on which the notes were given which amounted to a failure of consideration;

(iii) that the issuance of the four promissory notes was a violation of the provisions of the Exchange Control Act 1953 and that pursuant to s. 24 of the Contracts Act 1950 these promissory notes were void and unenforceable.

Held:

[1] On the face of the four promissory notes, the Court was satisfied that they were bills of exchange within the definition of s. 88(1) of the Bills of Exchange Act 1949. From the authorities, it is quite clear that a bill of exchange is to be treated as cash.

[2] On the second issue, the principle is that where a claim of the plaintiffs against the defendant is based on a dishonoured promissory note, the purported claim for unliquidated damages for breach of contract or defence of failure of consideration does not afford a defence nor is it available as set-off or counter-claim. Looking at the claim as a whole, it is a straight forward case of an action on the promissory notes.

[3] On the authority of *Contract and Trading Company* (*Southern Ltd.) v. Barbey and Ors.* [1960] AC 244 HL(E) at 257, the Court had no alternative but to reject the defendant's contention that the four promissory notes were void and unenforceable.

[4] The defendant had not raised any triable defence or issues of law and fact to enable the Court to grant him unconditional leave to defend.

[Appeal allowed. Plaintiff entitled to judgment as prayed with costs.]

Cases also referred to:
Fielding and Platt Ltd. v. Selim Najjar [1969] 2 All ER 150
James Lamont & Co. Ltd. v. Hyhand Ld. [1950] KBD 585
Nova (Jersey) v. Kammgarn [1977] LLR Vol. 1, p. 463
Jackson v. Murphy [1887] 4 TLR 92n
Contract and Trading Company (Southern Ltd.) v. Barbey and Others [1960] AC 244 HL (E)

Legislation referred to:
Bills of Exchange Act 1949, s. 88(1)
Contracts Act 1950, s. 24
Exchange Control Act 1947 [UK], ss. 33(1), 36
Exchange Control Act 1953 ss. 9, (1)
Rules of the High Court 1980, O. 14
Rules of the Supreme Court [UK], O. 14

For the plaintiffs/appellants - K. Anantham; M/s. Skrine & Co. (Tin Taylor, Instructing Solicitor with him)
For the defendant/respondent - K.S. Narayanan; M/s. Ng Ek Teong & Partners

JUDGMENT

Mohamed Dzaiddin J:

This is an appeal by the plaintiffs against the decision of the learned Registrar made on 3 October 1985 dismissing the plaintiffs' application for leave to enter final judgment against the defendant under O. 14 of the Rules of the High Court.

Mr. Anantham, Counsel for the plaintiffs affirmed an affidavit on 6 April 1986 verifying that the defendant is and was truly indebted to the plaintiffs in the sum of £1,551,352.76 and US$59,677.93 as principal sums and £123,417.55 and US$4,747.67 as interest respectively arising from his failure to honour the four promissory notes when presented for payment. In short, the basis of the plaintiffs' claim is on four promissory notes given by the defendant to the plaintiffs on 27 August 1984 and payable to them on 31 October 1984. However, when these four promissory notes were presented at the plaintiffs' bank they were dishonoured.

On 28 August 1985, the defendant affirmed an affidavit setting out the sequence of events leading to his issuing the four promissory notes. Briefly, some time in 1982 the defendant bought over a company known as Cocoa Processors Sdn. Bhd. ("the company") with its principal asset a cocoa processing factory situated at Parit Buntar Industrial Estate. The defendant then entered into some trading arrangements with the plaintiffs whereby the latter's principal, Philipp Brothers Inc. of America (PhiBro) agreed to support him in his new venture and provide him expertise in the field of cocoa trading and processing so as to build up the defendant's personal position in the cocoa market in this region. Needless to say, the defendant who is an advocate and solicitor as well as a well-known entrepreneur may lack the expertise in this new-found venture. The trading arrangements included advice and expertise in trading transactions for investment purposes. Arising from the said arrangements the company incurred substantial loss in the terminal cocoa trading account for the years 1983 and early 1984. On or about April 1984 the defendant was informed by the plaintiffs about these losses. He alleged that he was persuaded to acknowledge these losses and to come to certain arrangement for payments of these losses. Consequently, on 12 April 1984 the plaintiffs prepared six promissory notes for execution by the defendant. However, these notes were found to be defective and on 27 August 1984 the defendant executed fresh promissory notes, four of which formed the subject matter of this suit.

Later, the defendant became aware that the losses as shown on the trading accounts were not entirely due to erratic market conditions, but due to improper or fraudulent advice given by the plaintiffs' principal, PhiBro. The defendant deposed that he intended to file a counterclaim against the plaintiffs and their principal in the event leave to defend is upheld by this Court. Further, it was alleged that the plaintiffs had also failed to furnish him with invoices on the purported losses contrary to the terms contained in a letter dated 26 July 1984. The defendant also alleged that the plaintiffs were seeking in this suit to recover from him further sums of money outside the trading losses.

Upon considering the defendant's affidavit, it is quite clear to me that the following issues are raised to show that there is a triable defence:

(1) that the four promissory notes which he had issued are not promissory notes within the meaning of the Bills of Exchange Act 1949;

(2) that as the basis and conditions on which the said notes were given had not been complied with, there was therefore a breach of the terms on which the notes were given which amounted to a failure of consideration;

(3) that the issuance of the four promissory notes was a violation of the provisions of the Exchange Control Act 1953 and that pursuant to s. 24 of the Contracts Act 1950 these promissory notes were void and unenforceable. In addition, it is also contended that the plaintiffs' action for enforcement of payment under the said promissory notes were premature and misconceived because the permission of the Controller of Foreign Exchange had not been obtained.

On the face of these four promissory notes, I am satisfied that they are bills of exchange within the definition of s. 88(1) of the Bills of Exchange Act 1949. From the authorities, it is quite clear to me that a bill of exchange is to be treated as cash. In *Fielding and Platt Ltd. v. Selim Najjar* [1969] 2 All ER 150 at 152, Lord Denning MR said:

> We have repeatedly stated in this Court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some given reason to the contrary, e.g. if there is an arguable case based on total failure of consideration.

On the second issue, the principle is that where a claim of the plaintiffs against the defendant is based on a dishonoured promissory note, the purported claim for unliquidated damages for breach of contract or defence of failure of consideration does not afford a defence nor is it available as set-off or counter-claim (*James Lamont & Co. Ld. v. Hyhand Ld.* [1950] KBD 585; *Nova (Jersey) v. Kammgarn* [1977] LLR Vol. 1, p. 463). It is said that only in exceptional circumstances or upon strong grounds that the defendant will be allowed to set up such defence or a set-off or counter-claim. The principle is that a bill, cheque or note is given and taken in term of so much cash, and not as merely giving a right of action for the creditors to litigate a counterclaim (*Jackson v. Murphy* [1887] 4 TLR 92n). Counsel for the defendant, in his submission, invited me to consider some of the conditions precedent which the plaintiffs had to fulfil before the promissory notes could be honoured. He referred to the failure of the plaintiffs and their principal to comply with their obligations under the trading arrangements. Counsel also submitted that the plaintiffs had failed to provide invoices on the purported losses contrary to the terms stated in the defendant's letter of 26 July 1984. There was, therefore, a breach of the terms on which the notes were given amounting to a failure of consideration. In my opinion, after having perused the correspondence in KRJ 1, Counsel's contention is unfounded. Looking at the claim as a whole, I find it is a straightforward case

of an action on the promissory notes. As such, no oral evidence is necessary to show the basis on which the notes were issued. In fact, relying on the authorities cited above, there must be exceptional circumstances or upon strong grounds before the defendant can be allowed to set up his defence of failure of consideration or fraudulent advice or to counterclaim for damages for breach of contract. In my judgment, there is no justification for this submission by Counsel.

With regard to the third issue, Counsel submitted that the issuance of these four promissory notes contravened s. 9 of the Exchange Control Act 1953 because the requisite permission of the Controller had not been obtained. Section 9(1) states as follows:

> Except with the permission of the Controller no person shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the scheduled territories.

Counsel referred me to the dissenting judgment of Lord Keith of Avonholm in *Contract and Trading Company (Southern Ltd.) v. Barbey and Ors.* [1960] AC 244 HL (E) at 257. In that case, the plaintiffs were foreigners, who were the holders in due course of bills of exchange for a sum of £8,700, of which the defendants, an English company, were the acceptors. The plaintiffs were resident outside the scheduled territories, and, accordingly, Treasury permission was required by virtue of the Exchange Control Act, 1947, for the payment of the bills by the defendants to the plaintiffs. No such permission was granted. The plaintiffs sued the defendants on the bills of exchange and applied for summary judgment under RSC, O. 14. Apart from the possible effect of the Act of 1947, the defendants did not dispute their liability on the bills. The defendants contended that the plaintiffs' claim was defeated, not only by the withholding of Treasury consent, but also by the implied term in s. 33(1) of the Act of 1947, and that therefore the plaintiffs could not bring themselves within para. 4 of Schedule IV to the Act, which was limited to cases where the parties had excluded the implied term:

> Held (Lord Keith of Avonholm dissenting), that para. 4 of Schedule IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligation. A debt existed even though Treasury permission had not been granted, and it might not be paid without that permission. Accordingly, a debt arising under a bill of exchange was one of which para. 4 applied, and a claim for its recovery was not defeated by the fact that permission to pay had not been given (post, p. 252).
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> The Act does not provide a moratorium for debtors but only controls the immediate destination of the payments they make. Moneys due under judgments can be paid into Court, thus discharging the debtor, and the fund itself still remains out of control of the creditor until consent has been obtained (post, pp. 253, 254 & 256).

It should be noted that the English s. 33 referred to above is similar to our s. 36 of the Exchange Control Act and para. 4(1) of Schedule IV is also the same as our para. 4 of Fourth Schedule. S. 36 provides as follows:

> (1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:
>
> Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of this Act or for any other reason.

(2) Notwithstanding anything in the Bills of Exchange Ordinance, 1949, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Controller under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note.

(3) The Fourth Schedule shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration or the estates of deceased persons, the winding-up of companies, and proceedings under deeds of arrangement or trust deeds for behove of creditors.

Therefore, in view of the majority decision in *Contract's* case, I have no alternative but to reject Counsel's contention that the four promissory notes are void and unenforceable.

Therefore, having considered this case as a whole, I am satisfied that the defendant has not raised any triable defence or issues of law and fact to enable this Court to grant him unconditional leave to defend. It is unfortunate that the learned Registrar did not give her reasons for granting the defendant unconditional leave to defend except by stating that "application dismissed with costs". Be that as it may, as this was an appeal by way of a rehearing, and after having considered the issues submitted by learned Counsel for the defendant, I am satisfied that leave to defend ought not to have been granted by the learned Registrar. This appeal is allowed and the plaintiff is therefore entitled to judgment as prayed with costs.

As both Counsel had agreed that this decision will bind Civil Suit No. 307 of 1985, I also allow the appeal in that Suit with costs.

Also found at [1986] 2 CLJ 130